Operating Engineers, Local Union No. 3, International Union of Operating Engineers, AFL–CIO *and* Specialty Crushing, Inc. Case 32–CB–4847

June 21, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On May 5, 1998, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent Union filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and, for the reasons set forth below, has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(b)(1)(A) by threatening to discipline, and disciplining, members John Hillman, Ruben Serrano, David Knapp, and Preston Pope because those members continued to work for a nonunion employer, Specialty Crushing, Inc. Specifically, the judge found that the Respondent's threats and discipline were unlawful efforts to impose representation on a unit of employees who recently had rejected the Respondent in a Board-conducted election. We agree.

It is well settled that unions are prohibited under Section 8(b)(1)(A) from coercing employees in the exercise of rights guaranteed by Section 7 of the Act. Although the proviso to Section 8(b)(1)(A) permits labor organizations to prescribe their own rules regarding the acquisition and retention of membership,[1] the scope of the proviso is limited. As set forth in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), a union may enforce properly adopted internal rules against its members only where those rules: (1) reflect a legitimate union interest; (2) impair no policy Congress has imbedded in the labor laws; *and* (3) are reasonably enforced against union members who are free to leave the union and escape the rule. Here, the Respondent has not satisfied the third element of the *Scofield* test. Thus, without deciding whether the Respondent had a properly adopted rule prohibiting members from working for a nonunion employer,[2] we agree with the judge that—even were there such a rule—it was not reasonably enforced against the four members. Rather, that rule was disparately enforced against these members.

As fully set forth in the judge's decision, since at least 1996, the Respondent has sought recognition from, and a collective-bargaining relationship with, Specialty Crushing, Inc., a nonunion construction industry employer.[3] In April 1997, the Respondent sought voluntary recognition from the Eployer, based on a proffered card check assertedly showing majority employee support for the Union. The Employer rejected this request. In June 1997 the Respondent sought recognition through a Board-conducted election, which the Union lost by a 5 to 5 vote.[4]

After the election the Respondent devised another strategy for obtaining recognition from the Employer. In July 1997 it decided to pull its members off the Employer's jobsites in order to pressure Specialty Crushing into recognizing and bargaining with it.[5] Towards this end, the Respondent's agents visited various employer jobsites between July 28 and 30, 1997, and ordered members David Knapp, Tom Brown, John Hillman, Ruben Serrano, and Preston Pope to cease working for Specialty Crushing. The agents told these members that if they did not leave, they would face fines, suspensions, or expulsion from membership with "attendant loss of membership privileges and or benefits." When Knapp, Hillman, Serrano, and Pope remained on their jobsites, or later returned to them, the Respondent filed internal charges against each for "refus[ing] to comply with the lawful orders of the local Union." The Respondent also directed Knapp, Hillman, Serrano, and Pope to appear before its trial committee. When the four members declined, they were tried in their absence and fined. Only after the instant 8(b)(1)(A) charge was filed, did the Respondent notify the four members that the charges against them had been dismissed and that their fines had been rescinded.

[1] The proviso specifies that: Sec. 8(b)(1)(A) "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership."

[2] At the time that the Respondent disciplined Knapp, Hillman, Serrano, and Pope, it had no express rule prohibiting members from working nonunion. Such a rule was enacted on October 12, 1997, after the instant unfair labor practice charge was filed. It did have a rule that specified that members must "conform and abide by the hours, wages, and conditions of employment provided for in agreements negotiated by this Local Union."

[3] As found by the judge, on occasion Specialty had entered into project-only agreements with the Union or worked as a subcontractor on jobs requiring it to be bound to the terms of the extant union collective-bargaining agreement. At all relevant times, however, Specialty had declined union overtures to recognize it and sign an agreement.

[4] Among the eligible voters were five union members. Of course, we do not know, and will not inquire into, how any employee voted in the election.

Hillman did not vote in the election. Although Hillman described himself as a supervisor, there was no allegation or finding that he was a Sec. 2(11) supervisor or that he was not covered by Sec. 7 of the Act.

[5] The Respondent concedes that its object was recognitional. Business Representative Michael Dunlap testified that the Union's objective in pulling members from the jobsites was to "get [Specialty] to sign this signatory agreement." Union organizer Jay Bosley similarly testified that the Respondent's object was to "apply economic pressure that would encourage [Specialty] to come to terms with us." Respondent's counsel at hearing and in his brief to the judge further conceded this object. In the latter, counsel stated that:

> Despite the loss in the representation election, the Union still sought to establish a comprehensive collective bargaining relationship with the Employer. In order to put economic pressure on the Employer to sign a pre-hire agreement, the Union devised a strategy to deprive the Employer of skilled labor.

The Respondent's July 1997 directive that these members cease working for the Employer was the first such directive that any of them had received. Although Knapp, Hillman, Serrano, and Pope had been union members and employees of nonunion Specialty Crushing for significant periods,[6] none previously had been told that he was prohibited under the Union's constitution or bylaws from working for Specialty Crushing. Neither had any of these members been told that he could not work for any other nonunion employer. Michael Dunlop, the Respondent's business agent who ordered the members to leave the jobsites, admitted that he knew of no other situation where any of the Union's approximately 35,000 members had been cited for working nonunion. Further, the Respondent adduced evidence of only one other instance in the preceding 5 years where members had been cited for working nonunion. That incident, which occurred in 1994, involved three members working at a single site. Under these facts, we find that the Respondent failed to establish that it lawfully disciplined the four members pursuant to a validly enforced rule. See generally *Electrical Workers IBEW Local 1579*, 316 NLRB 710 (1995). Accordingly, the discipline was not protected under *Scofield* principles.[7]

Further, to the extent that the Respondent argues that its discipline of Knapp, Hillman, Serrano, and Pope was privileged because it was undertaken for the lawful purpose of obtaining recognition from Specialty Crushing, we find this defense lacks merit. Thus, based on the June 1997 election, the Respondent was foreclosed from obtaining another representation election in July 1997,[8] or—under the principles of Section 8(a)(2)—from compelling Specialty Crushing to recognize it as a 9(a) representative.[9] As to the Respondent's argument that its discipline was privileged because it was undertaken for the lawful purpose of obtaining 8(f) recognition from the Employer, we find that this defense lacks merit. *John Deklewa & Sons*, 282 NLRB 1375, 1385 (1987), and *Luterbach Construction Co.*, 315 NLRB 976, 978 (1994).[10]

[6] Knapp had been a union member and Specialty employee since July 1996. Hillman, a 20-year union member had been employed by Specialty for more than 5 years. Serrano joined the Union in August 1995, a few months before commencing work for the Employer. Pope had worked for the Employer since 1989 and joined the Union in 1993.

[7] Members Hurtgen and Brame agree with this conclusion. They also note that the Respondent did not rely on the rule cited in fn. 2 above at the time of the events here.

[8] Sec. 9(c)(3) prohibits elections in any bargaining unit, where—in the preceding 12 months—a valid election has been held.

[9] Nor does the Respondent claim that, following the election, it achieved majority support among the Employer's employees.

[10] As the Board held in *Deklewa*: "A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship. In that event, the Board will prohibit the parties from reestablishing the 8(f) relationship covering unit employees for a 1-year period." Where, as here, the employees voted to reject a 9(a) status, we find that the *Deklewa* principle likewise precludes parties from establishing an 8(f) relationship during the year following the election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO, it officers agents and representatives take the action set forth in the Order.

Valerie Hardy-Mahoney, Esq., for the General Counsel.
Timothy Sears, Esq., of Alameda, California, for the Respondent.
Paul Simpson, Esq. (Simpson, Aherne & Garrity), of San Francisco, California, for the Employer.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on January 26, 1998. On August 1, 1997, Specialty Crushing, Inc. (the Employer) filed the charge alleging that Operating Engineers, Local Union No. 3, of the International Union of Operating Engineers, AFL–CIO (Respondent or the Union) committed certain violations of Section 8(b)(1)(A) of the National Labor Relations Act (the Act). On October 9, 1997, the Acting Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that the Union violated Section 8(b)(1)(A) of the Act by threatening employees with union discipline for working for the Employer. The complaint was amended at the hearing. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a California corporation with offices and a principal place of business located in Oakland, California, where it is engaged in the processing of recycled materials. During the 12 months prior to issuance of the complaint, Respondent sold goods or provided services valued in excess of $50,000 directly to customers who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. Accordingly, Respondent admits and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that at all times material Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Employer is a rock-crushing contractor with operations throughout Northern California. It is not signatory to any collective-bargaining agreement with the Union, although on oc-

casion it has signed "project agreements" with the Union or has worked as a subcontractor on construction projects binding it to the terms of an agreement between its general contractor and the Union. The subcontracting clause under which the Employer agreed to be bound to the terms of the collective-bargaining agreement between its general contractors and the Union reads in pertinent part:

> That if an Individual Employer shall contract on-site work as herein defined, such subcontract shall state in writing that such subcontractor agrees to be bound by and comply with the terms and provisions of this Agreement in the performance of his subcontract.

Pursuant to project agreements and subcontractor clauses, the Union has referred union workers to the Employer for work on covered jobsites. Apparently, employees so referred have continued to work for the Employer on nonunion jobsites.

Respondent has been interested in organizing the production and maintenance employees of the Employer since at least 1996. On April 17, 1997, Respondent made a demand for recognition and bargaining. The Union offered to prove its majority status through a card check. The Employer refused to voluntarily recognize the Union. That same date, the Union filed a representation petition with the Board in Case 32–RC–4287. Pursuant to that petition, an election was held on June 5, 1997. The tally of ballots shows that five employees voted for representation by the Union and five employees voted against union representation. Five of these 10 voters were members of the Union.

The instant case involves actions taken against union members by agents of Respondent, in July 1997. The General Counsel contends that Respondent did not have any internal union rule barring members from working for nonsignatory or nonunion employers and has not uniformly required members not to work for such nonsignatory or nonunion employers. The General Counsel further argues that Respondent was motivated by the employees' rejection of union representation in Case 32–RC–4287. Respondent, on the other hand, contends that it has interpreted its rules as barring employees from working under wages or conditions less than those provided in its collective-bargaining agreement. Respondent contends that it, and not the Board, should be the sole arbitrator of internal union rules. Further, Respondent argues that it had no intention of retaliating against employees for the representation election. Respondent asserts that it had no reason to believe that the five Union members did not vote for union representation. Respondent argues that it simply sought to withhold union labor from the Employer in hopes of obtaining recognition and bargaining.

Despite the loss in the June 5 election, the Union still sought to establish a collective-bargaining relationship with the Employer. On July 14 Respondent's organizers and business agents decided to put economic pressure on the Employer to sign a prehire agreement by ordering union members to withdraw from the Employer's jobsites and expelling any member who did not comply with union directives to cease working for the Employer.

On July 28 Michael Dunlap and Walt Powers, business agents for Respondent, visited the Employer's jobsite in Antioch, California. Dunlap read a prepared statement to employees David Knapp and Tom Brown—"I am ordering you to cease work for this employer and withdraw from this jobsite. Failure to abide by this lawful order may result in your being fined, suspended or expelled from membership in the local union with the attendant loss of membership privileges and benefits." Both Knapp and Brown had quit working that day. Knapp returned to work the next day but Brown sought employment elsewhere.

Also, on July 28 Dunlap visited the Employer's Oakland jobsite, where union members John Hillman and Ruben Serrano were working. Dunlap read the prepared statement to Hillman, a supervisor for the Employer. Dunlap similarly read the prepared statement to Serrano. Serrano told Dunlap that he needed the job and asked if Dunlap would find another job for him. Dunlap replied that he would see what he could do but that if Serrano did not leave the job, Serrano would be subject to union expulsion and fines. Neither Hillman nor Serrano left the jobsite that day.

Dunlap filed a grievance on July 28 alleging that Serrano violated section III(j) of the Union's bylaws, which provides that members shall not refuse to comply with the "lawful orders" of Respondent. Here, Respondent relies on article III, section 1, of the Union's bylaws which provides in relevant part:

> Every Member will be required:
>
> (a) To conform to and abide by the hours, wages and conditions of employment provided for in agreements negotiated by this Local Union.
>
> (b) No Member may enter into an individual or personal contract or agreement with his Employer which serves to lower the wages, hours or conditions of employment negotiated by this Local Union.
>
> (c) No Member shall engage in conduct discreditable to this Local Union.
>
> (d) No Member shall refuse to comply with the lawful orders of the Local Union.

While Respondent contends that these provisions prohibit union members from working for nonsignatory employers, it could produce evidence of only three employees on one jobsite in 1994, that were disciplined under these provisions within the past 5 years. Dunlap admitted that while Respondent had over 35,000 members, he was not aware of any member being cited for working for a nonsignatory employer prior to this case.

On July 29 employee Knapp returned to work at the Antioch jobsite. Powers also returned to the jobsite that day and informed Knapp that there would be "consequences" because Knapp had been working for the Employer. On July 29 grievances were filed against Hillman and Knapp for working in violation of section III(j) of Respondent's bylaws.

On July 30 Dunlap found union member Preston Pope working at the Employer's Oakland jobsite. Dunlap read the same prepared order requiring the employee to cease working for the Employer. Pope declined to leave the jobsite and a grievance was filed against him that same date.

Following the filing of the internal union grievances against Hillman, Knapp, Serrano, and Pope, each were cited to appear before a trial committee of the Union. None of the employees appeared and their cases were heard in their absence. The trial committee imposed fines on each of the four employee-members.

Knapp, Hillman, Serrano, and Pope had all been members of the Union and working for the Employer prior to the June 5 election. David Knapp began working for the Employer in July 1996 and joined the Union at that time. John Hillman had worked for the Employer for over 5 years and had been a union

member for 20 years. Ruben Serrano started working for the Employer in November 1995 and joined the Union in August 1996. Preston Pope has worked for the Employer since 1989 and joined the Union in 1993. Not one of these employees had been notified by the Union, prior to July 1997 that working for the Employer or any nonsignatory contractor was a violation of the Union's bylaws.

On August 1 the unfair labor practice charge in this case was filed. Thereafter, on October 3 Respondent's business manager dismissed the union grievances against the four members and rescinded the fines that had been imposed. On October 12 Respondent's executive board adopted a rule which prohibits members from working for nonsignatory employers. The rule specifically provides that members shall not perform work for nonsignatory employers except where such employment is authorized by the Union for purposes of organizing or other legitimate union objectives. The new rule was published in Respondent's newspaper and was posted by Respondent in its hiring halls. The four employees involved in this case were given written notice of the new rule.

Analysis and Conclusions

Section 8(b)(1)(A) of the Act provides that it shall be an unfair labor practice for a labor organization "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of the Act." The proviso to Section 8(b)(1)(A) states that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

In *Scofield v. NLRB*, 394 U.S. 423, 430 (1969), the Supreme Court stated that Section 8(b)(1)(A) leaves a union free to enforce "a properly adopted rule, provided that the rule (1) "reflects a legitimate union interest," (2) "impairs no policy Congress has imbedded in the labor laws," and (3) "is reasonably enforced against union members who are free to leave the union and escape the rule."

The inquiry here is whether the rule was properly adopted and whether the rule was reasonably enforced, within the meaning of *Scofield*. Further at issue is whether the Union's attempt to enforce the rule after it lost the Board conducted election impairs a statutory labor policy.

In its *Scofield* decision, the Supreme Court explained that by a properly adopted rule it meant "a union rule, duly adopted and not the arbitrary fiat of a union officer." 394 U.S. at 429. Here the Union did not have a rule which expressly prohibited its members from working for nonunion employers, until after the charge in this case was filed. The rule which Respondent relied on stated that employees could be disciplined for violating the orders of a union official. Such a rule makes an employee subject to the arbitrary fiat of a union officer.

In *Electrical Workers IBEW Local 1579*, 316 NLRB 710 (1995), the Board found that a properly adopted union rule against working for a nonunion employer was enforced in violation of Section 8(b)(1)(A). The Board found that the respondent-union enforced the rule against a traveler, a member of a different local of the IBEW, but not against its own members. The Board held that enforcement of the rule did not meet the *Scofield* test because it was "not reasonably enforced." In the instant case, all of the employees who were disciplined had worked for the Employer with the Union's knowledge for at least a year. John Hillman had worked for the Employer for 5 years. Respondent did not enforce its rule, or even notify the employees of the existence of the rule. Respondent chose to enforce its rule only after the Employer's employees voted against union representation. Under these circumstances, I conclude that Respondent did not reasonably enforce a duly adopted rule within the meaning of *Scofield*.

The Supreme Court stated, in *Scofield,* that if the union rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced even by fine or expulsion, without violating Section 8(a)(1). 394 U.S. at 429. The General Counsel contends that the rule was enforced in retaliation for the failure of the employees to select the Union as their representative in the Board-conducted election. The Union received five votes in the election; the same number of votes as it had members. There was no reason for the Union to suspect that any member voted against representation. I find that the Union's motive was clear; it was determined to withhold skilled union labor from the Employer in attempt to force the Employer to recognize and bargain with the Union.

However, the fact that Respondent did not intend to retaliate against its members because the election does not resolve the issue of whether Respondent's conduct frustrates an overriding policy of the labor laws. Section 9(c)(3) provides "no election shall be directed in any bargaining unit or any subdivision within which, in the preceding 12-month period, a valid election has been held." Here the Union sought to apply its alleged rule shortly after it lost a valid election in hopes of obtaining recognition despite the election results. Such action appears to contradict the policies of the Act. The Act does not permit another election for 12 months after a valid election. This protects an employer from having successive election campaigns. However, this provision also protects employees who have voted against representation from having successive election campaigns. Section 8(a)(2) of the Act protects employees from having a union, that does not represent a majority of the employees, imposed on them. In the instant case, Respondent attempted to use intraunion discipline against its members to force the Employer to recognize it as the exclusive collective-bargaining agent of employees who had just rejected the Union in a Board-conducted election. In my view, such conduct is contrary to the labor policy embodied in Section 9(c) and Section 8(a)(2) of the Act that the employees and not the labor organization choose whether the employees are to be represented by a union.[1] By enforcing its bylaws in attempt to impose representation on a unit of employees that had just rejected such representation in a valid election, the Union violated Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. Specialty Crushing, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Operating Engineers, Local Union No. 3, International Union of Operating Engineers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(b)(1)(A) of the Act by filing internal grievances and citations against Hillman, Knapp, Serrano, and Pope and threatening them with reprisals.

[1] Sec. 8(f) permits a labor organization in the construction industry to enter into a prehire collective-bargaining agreement. However, such an agreement does not bar employees from voting against such representation.

4. Respondent's acts and conduct above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

Respondent Operating Engineers, Local Union No. 3, International Union of Operating Engineers, AFL–CIO, its officers agents, and representatives, shall

1. Cease and desist from

(a) Filing internal grievances against members or otherwise disciplining or threatening to discipline members because they have worked for Specialty Crushing, Inc., in the absence of a properly adopted rule which impairs no policy Congress has imbedded in the labor laws.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Regional Director post at its Northern California hiring halls, meeting rooms, and office copies in English and Spanish of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. Additional copies of said notices shall be provided to Specialty Crushing for posting, if it is willing, in such places as Specialty Crushing shall deem necessary. In the event that, during the pendency of these proceedings, Respondent ceased operations or closed any of the hiring halls or union offices involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Specialty Crushing, Inc., at any time since July 28, 1997.

(b) Within 21 days after service by the Regional Director, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT file internal grievances against members or otherwise discipline or threaten to discipline members because they have worked for Specialty Crushing, Inc., in the absence of a properly adopted rule which impairs no policy Congress has imbedded in the labor laws.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

OPERATING ENGINEERS, LOCAL UNION NO. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO

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[2] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board"